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Stark Requirements for Physician Leases

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Entities that lease space or equipment to or from referring physicians or allow referring physicians to use space or equipment free of charge must ensure their arrangements are structured to comply with the Federal Ethics in Patient Referrals Act (“Stark”)¹ if they intend to bill Medicare for services rendered or referred by the physicians. Under Stark, if a physician (or a member of the physician’s family) has a financial relationship with an entity, the physician may not refer patients to the entity for certain designated health services (“DHS”)² payable by Medicare unless the financial relationship is structured to fit within a regulatory safe harbor.³ Entities may not bill Medicare for services improperly referred and, if they have done so, the entity must repay amounts improperly received. Failure to report and repay within 60 days may result in additional civil penalties of \$15,000 per claim as well as False Claims Act liability.⁴ Repayments can easily run into the hundreds of thousands if not millions of dollars. Given the potential liability, it is critical that physician arrangements be structured to fit within the regulatory safe harbors.

Lease Arrangements. To fit within the Stark safe harbor applicable to leases for space or equipment,⁵ the agreement with the physician (or their family member) must satisfy all of the following:

1. The agreement must be set out in writing, signed by the parties, and specify the premises or equipment it covers.⁶ Beware situations in which the lease does not accurately document the space or equipment actually utilized, or the parties fail to execute the lease, or the parties continue to use the space or equipment after the lease terminates.
2. The term of the agreement must be at least one year, and compensation terms may not be amended during the first year. The parties may terminate the agreement within the first year of the arrangement, but if they do, the parties may not enter into a new agreement until after the first year expires.⁷
3. The space or equipment must not exceed that which is reasonable and necessary for the legitimate business purposes of the lease or rental.⁸
4. The space or equipment must be used exclusively by the lessee during the time the space or equipment is leased (i.e., the space or equipment must not be shared with or used by the lessor or any person or entity related to the lessor during the leased term), except that the lessee may make payments for the use of space consisting of common areas if the payments do not exceed the lessee’s pro rata share of expenses for the space based upon the ratio of the space used exclusively by the lessee to the total amount of space (other than common areas) occupied by all persons using the common areas.⁹
5. The rental charges over the term of the agreement must be set in advance and consistent with fair market value.¹⁰ Under Stark, “fair market value” means the value of rental property for general commercial purposes not taking into account its intended use. In the case of a lease of space, this value may not be adjusted to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor when the lessor is a potential source of patient referrals to the lessee. For purposes of this definition, a

rental payment does not take into account intended use if it takes into account costs incurred by the lessor in developing or upgrading the property or maintaining the property or its improvements.¹¹

6. The rental charges over the term of the agreement must not be determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties. The rental formula cannot be based on (i) a percentage of the revenue raised, earned, billed, collected, or otherwise attributable to the services performed or business generated in the office space; or (ii) per-unit of service rental charges, to the extent that such charges reflect services provided to patients referred by the lessor to the lessee. CMS has interpreted this requirement to prohibit “on demand” or very short term leases if the lessor refers the patients who will be served during the lease period.¹²

7. The agreement must be commercially reasonable even if no referrals were made between the lessee and the lessor.¹³

Expired Leases and Holdovers. Because the safe harbor requires a written, current lease, parties must beware situations in which the parties continue the arrangement after the written lease expires. The Stark safe harbor does allow a holdover month-to-month rental for up to six months immediately following the expiration of an agreement of at least one year that otherwise complied with Stark requirements, provided that the holdover rental is on the same terms and conditions as the immediately preceding agreement.¹⁴

Free Use of Space or Equipment. The free use of space or equipment by referring physicians generally creates a financial relationship that would trigger Stark; accordingly, DHS providers must beware situations in which they allow referring physicians to use space or equipment without charging fair market value rent per a Stark-compliant lease. Stark likely would not apply to commercially reasonable situations in which the lessor charged payers a facility fee or technical fee and the physicians charged his or her own professional fee, e.g., where medical staff members perform surgeries at a hospital. In such cases, both parties are compensated for their respective services by third parties.

Other Laws. In addition to Stark, providers and other entities must ensure that their space and equipment arrangements comply with other relevant laws, including the federal Anti-Kickback Statute and any applicable state laws. The Anti-Kickback Statute generally prohibits offering, paying, soliciting, or receiving remuneration to induce or reward referrals for items or services payable by government health care programs, including Medicare and Medicaid.¹⁵ The federal Anti-Kickback Statute is violated if “one purpose” of the transaction is to induce prohibited referrals unless the arrangement is structured to fit within a regulatory safe harbor.¹⁶ Although the Anti-Kickback safe harbor for space and equipment rentals requirements vary in some details from the Stark safe harbors,¹⁷ entities are likely to comply with the Anti-Kickback Statute if they structure their arrangements to comply with Stark. Regardless, entities must carefully and periodically review their physician contracts to ensure compliance with the applicable laws.

¹ 42 USC 1395nn and 42 CFR 411.351 et seq.

² “Designated health services” include (i) clinical laboratory services; (ii) physical and occupational therapy, and outpatient speech-language pathology services; (iii) radiology and certain other imaging services; (iv) radiation therapy services and supplies; (v) durable medical equipment and supplies; (vi) parenteral and enteral nutrients, equipment and supplies; (vii) prosthetics, orthotics, and prosthetic devices and supplies; (viii) home health services; (ix) outpatient prescription

drugs; and (x) inpatient and outpatient hospital services. 42 CFR 411.351.

³ 42 CFR 411.353.

⁴ 42 CFR 411.353(b)-(d); 42 USC 1320a-7k(d).

⁵ 42 CFR 411.357(a)-(b).

⁶ 42 CFR 411.357(a)(1) and (b)(1).

⁷ 42 CFR 411.357(a)(2) and (b)(2).

⁸ 42 CFR 411.357(a)(3) and (b)(3).

⁹ 42 CFR 411.357(a)(3) and (b)(3).

¹⁰ 42 CFR 411.357(a)(4) and (b)(4).

¹¹ 42 CFR 411.351.

¹² 42 CFR 411.357(a)(5) and (b)(5).

¹³ 42 CFR 411.357(a)(6) and (b)(6).

¹⁴ 42 CFR 411.357(a)(7) and (b)(7).

¹⁵ 42 USC 1320a-7b(b)).

¹⁶ U.S. v. Greber, 760 F.2d 68, 69 (3rd Cir. 1985); 42 CFR 1001.952.

¹⁷ See, e.g., 42 USC 1001.952(b) and (c).

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